



**DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155**

NOV 08 2018

Ref: 19-F-0180

Mr. Austin R. Evers
Executive Director
American Oversight
1030 15th Street NW
Suite B255
Washington, D.C. 20005

Dear Mr. Evers:

This letter acknowledges receipt and provides a final response to your Freedom of Information Act (FOIA) request (enclosed) which we received October 23, 2018 and assigned it case number 19-F-0180. We ask that you use this number when referring to your request.

This office handles FOIA requests for the Office of the Secretary of Defense and the Joint Staff (OSD/JS) only. This office does not process FOIA requests for the military departments, the combatant commands, or other Defense agencies and field activities. FOIA requests involving the search of offices outside of OSD/JS should be directed to the appropriate FOIA office. You may find links to the non-OSD/JS DoD FOIA requester services on our website at: <http://www.dod.mil/pubs/foi/>.

According to the FOIA's legislative history, a description would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort, and reasonably describes records if the agency is able to determine "precisely" what records are being requested.

Courts have identified at least three ways in which a FOIA request can fail to reasonably describe the records sought:

1. The description may be too vague to allow the agency to determine precisely what records are being requested. An agency is not required to have clairvoyant capabilities to discover the requester's need;
2. Broad sweeping requests lacking specificity are insufficient;
3. Even where a request sufficiently describes the records sought, an agency is not required to comply with a request so broad that it would impose an unreasonable burden upon the agency. An agency need not honor a request that requires an unreasonably burdensome search.

The "reasonably describes" requirement exists because the FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters. As such, it is the requester's responsibility to frame requests with sufficient particularity to ensure the searches are

not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested. As it stands, your request is both not reasonably described and promotes an unreasonably burdensome search in that it fails to provide understandable and comprehensive search terms, does not provide names of “custodians” and their special assistants with special assistants not defined, and lists individuals and functions within the Office of the Secretary of Defense and the Deputy Secretary of Defense that do not exist. Accordingly, your request is now closed in this office.

We would suggest for any follow-on FOIA requests that you limit the search to electronic and paper records to include e-mails for the Secretary of Defense and his Deputy since these records would most likely cover the spectrum desired within the OSD, reformulate your search terms to key words and terms understood and used within the OSD/JS (i.e., trade, trade wars, tariffs, reciprocal and escalating tariffs), and provide names to match desired “special assistants”.

If you are not satisfied with this response, you may contact our OSD FOIA Public Liaison, Jim Hogan, at 571-372-0462 or by email at OSD.FOIALiaison@mail.mil. Also, please note that the Office of Government Information Services (OGIS) offers services to requesters who have disputes with Federal agencies. You may contact OGIS if you have concerns about the processing of your request. Their contact information is provided below:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

You have the right to appeal to the appellate authority, Ms. Joo Chung, Director of Oversight and Compliance, Office of the Secretary of Defense, by writing directly to OCMO Office of the Chief Management Officer, 4800 Mark Center Drive, ATTN: DPCLTD, FOIA Appeals, Mailbox# 24, Alexandria, VA 22350-1700. Your appeal must be postmarked within 90 calendar days of the date of this response. Alternatively, you may email your appeal to osd.foia-appeal@mail.mil. If you use email, please include the words "FOIA Appeal" in the subject of the email. Please also reference case number 19-F-0180 in any appeal correspondence.

The action officer assigned to your request is Mr. David Swiney, who can be reached at either david.k.swiney.civ@mail.mil or (571) 372-0427 for any questions.

Sincerely,

A handwritten signature in black ink, appearing to be 'S. Carr', written over a horizontal line.

For Stephanie L. Carr
Chief

Enclosure:
As stated



19-F-0180

~~OCT 24 2018~~

OCT 22 2018

October 23, 2018

VIA ELECTRONIC MAIL

OSD/JS FOIA Requester Service Center
Chief, Ms. Stephanie Carr
Office of Freedom of Information
U.S. Department of Defense
1155 Defense Pentagon
Washington, DC 20301-1155
whs.mc-alex.esd.mbx.osd-js-foia-requester-service-center@mail.mil

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and your agency's implementing regulations, American Oversight makes the following request for records.

President Trump since January 2018 has imposed a series of tariffs on various goods and countries. In late September 2018, Trump announced 10 percent tariffs on \$200 billion a year of Chinese goods, and Chinese officials quickly responded with tariffs on \$60 billion in American goods.¹ Press reporting suggests decisions regarding tariffs are being made in a haphazard fashion without following standard procedures of coordinating across government departments and agencies.² In addition, sectors and trade groups are being taken by surprise by the escalatory trade tactics.³

American Oversight seeks the following records in an effort to shed light on the effect of the administration's trade policies on American manufacturing and employment, and to determine the influence of industry lobbyists on administration policies.

¹ Keith Bradsher, *China Once Looked Tough on Trade. Now Its Options Are Dwindling*, N.Y. TIMES, Sept. 18, 2018, <https://www.nytimes.com/2018/09/18/business/china-trade-war-retaliate.html?action=click&module=Top%20Stories&pgtype=Homepage>.

² Bob Woodward, *Fear: Trump in the White House* 159-161 (1st ed. 2018).

³ Khorri Atkinson, *What They're Saying: Local Industries React to Trump's Trade War*, AXIOS (July 8 2018), <https://www.axios.com/local-industries-react-trump-trade-war-fishing-seed-agriculture-daily-ad04a26d-448f-4bbd-92ec-2ae06ce3a713.html>.

Please provide all responsive records from January 20, 2017, through the date the search is conducted.

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts. Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.⁴ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁵**

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered your

⁴ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

⁵ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

Requested Records

American Oversight requests that your agency produce the following within twenty business days:

All records reflecting communications (including emails, email attachments, calendar entries/invitations) of the agency custodians specified below with at least one term from column A and one term from column B:

Column A	Column B
i. Trade	i. War
ii. Tarif*	ii. Tit-for-tat
iii. Tarrif*	iii. Escalat*
iv. 232	iv. Exempt*
v. 1862	v. Exclu*
vi. 301	
vii. 2411	

Please note that American Oversight is here using the asterisk (*) to designate the standard use of “wildcards” in the search for responsive records. For example, a search for “separat*” would return all of the following: separate, separates, separated, separation, etc. If you are unable to search for wildcards, please advise so that we may specifically include the variations that we would like searched.

Specified Agency Custodians:

Political appointees* in the immediate Office of the Secretary, including:

- i. Secretary of Defense
- ii. Deputy Secretary of Defense
- iii. Special Assistants to the Secretary and Deputy Secretary of Defense
- iv. Senior Advisors the Secretary and Deputy Secretary of Defense
- v. Special Assistant for White House Liaison
- vi. Deputy White House Liaison
- vii. Special Assistant to the White House Liaison
- viii. Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy

*“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a non-career SES, any Schedule C employees, or any persons hired under Temporary Non-Career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

agency's prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.⁶ Furthermore, agencies that have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians' files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that your agency use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information "only if . . . disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."⁷ If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA."⁸ Moreover, the *Vaughn* index "must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information."⁹ Further, "the withholding agency must supply 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'"¹⁰

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the

⁶ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, "Managing Government Records Directive," M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

⁷ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁹ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹⁰ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

document.¹¹ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, you are on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight hopes to decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's implementing regulations, American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to public understanding of those operations. Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees because disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of activities of the government. The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how the high-ranking officials who carry out U.S. trade policy are influenced by private companies and their lobbyists, as other public records have shown has occurred in some circumstances.¹² The disclosure of the records requested here will also shed light on the federal government's approach to trade policy in an environment where U.S. firms are facing retaliatory tariffs that may cause American job losses.¹³ Due to this

¹¹ *Mead Data Central*, 566 F.2d at 261.

¹² Cara Lombardo, *Singled Out by Trump, Harley Davidson Opposed Higher Tariffs*, THE SEATTLE TIMES (Mar. 1, 2017, 4:15 PM), <https://www.seattletimes.com/business/harley-davidson-may-differ-with-trump-on-trade-solution/>.

¹³ See, e.g., Bob Ryan, *Trump's Trade War Id Already Leading to Layoffs and Pain for American Businesses*, BUSINESS INSIDER (Aug. 9, 2018, 11:42 AM), <https://www.businessinsider.com/trump-tariffs-trade-war-layoffs-business-losses-2018-8>; Stuart Anderson, *Tariffs Are Costing Jobs: A Look*

administration's aggressive trade policy actions, these topics have received extensive media coverage and public interest.¹⁴ And, as described below, American Oversight has the intention and ability to disseminate the records it received to a broad audience.

This request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records. As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹⁵ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,¹⁶ American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.¹⁷ As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and

At How Many, FORBES (Sep. 24, 2018, 12:04 AM), <https://www.forbes.com/sites/stuartanderson/2018/09/24/tariffs-are-costing-jobs-a-look-at-how-many/-23416c7b26ef>; Alan Rappeport, *Harley-Davidson, Blaming E.U. Tariffs, Will Move Some Production Out of U.S.*, N.Y. TIMES, June 25, 2018, <https://www.nytimes.com/2018/06/25/business/harley-davidson-us-eu-tariffs.html>; Rajesh Kumar Singh, *Harley Warns of Hit from EU Reprisal Against Trump's Tariffs*, REUTERS (June 1, 2018, 1:33 PM), <https://www.reuters.com/article/us-harley-davidson-tariffs/harley-warns-of-hit-from-eu-reprisal-against-trumps-tariffs-idUSKCN1IX5JF>.

¹⁴ See, e.g., Kenneth Rapoza, *Here Are Some American Losers In Trump's China Trade War*, FORBES (July 13, 2018, 8:33 AM), <https://www.forbes.com/sites/kenrapoza/2018/07/13/here-are-some-american-losers-in-trumps-china-trade-war/#4290d401f528>; Ana Swanson, *Trump's Trade War With China Pierces the Heart of Michigan*, N.Y. TIMES, July 12, 2018, <https://www.nytimes.com/2018/07/12/us/politics/trade-war-china-michigan.html>; Nicole Gookind, *Trump Trade War Already Costing American Jobs as Harley-Davidson Announces Move Overseas*, NEWSWEEK (June 25, 2018, 12:08 PM), <http://www.newsweek.com/tariffs-trump-motorcycles-harley-davidson-europe-china-994366>.

¹⁵ American Oversight currently has approximately 11,900 page likes on Facebook and 45,300 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Oct. 19, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Oct. 19, 2018).

¹⁶ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

¹⁷ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.¹⁸

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Dan McGrath at foia@americanoversight.org or (202) 897-4213. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,



Austin R. Evers
Executive Director
American Oversight

¹⁸ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.